91-1832

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

POLING CHANG,
EXECUTRIX OF THE ESTATE OF HAN CHANG,

Petitioner,

v.

ARGONNE NATIONAL LABORATORY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether naming Dr. Han Chang, a deceased plaintiff, instead of naming his executrix, was sufficient to satisfy the specificity requirement of Rule 3 (c) of the Federal Rules of Appellate Procedure.

LIST OF PARTIES

The caption identifies the petitioner as Dr. Han Chang's widow Poling Chang. The respondent is Argonne National Laboratory. Dr. Han Chang's executrix, Poling Chang, seeks a writ of certiorari as his representative.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Poling Chang, Dr. Han Chang's executrix, respectfully requests that a writ of certiorari issue to review the orders of the Seventh Circuit Court of Appeals issued in the above entitled proceedings.

OPINIONS BELOW

The orders of the Court of Appeals for the Seventh Circuit are unpublished and are printed in the appendix hereto.

JURISDICTION

The orders of the Seventh Circuit Court of Appeals dismissing the appeal of Dr. Han Chang were entered on September 3, 1991 and October 9, 1991. The Court of Appeals denied petitioners' motion for reconsideration on October 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATEMENT OF THE CASE

Dr. Han Chang, personally pursued his national origin discrimination claims against respondent Argonne National Laboratory until the time of his death. His wife, Poling Chang, thereafter named executrix of his estate, was substituted as his representative. She participated in the trial of his claims. At trial, Dr. Chang's

claims were decided against him. A timely appeal to the Seventh Circuit Court of Appeals was taken on June 27, 1991.

On July 12, 1991, the Seventh Circuit, *sua sponte*, issued an order requesting that Dr. Han Chang file a memorandum "stating why this appeal should not be dismissed for lack of jurisdiction as to Han Chang." On July 25, 1991, counsel for petitioners filed his memorandum opposing dismissal and contemporaneously filed a motion to amend the notice of appeal or in the alternative to substitute Poling Chang as the named appellant.

On September 3, 1991, the Seventh Circuit dismissed without opinion the appeal of Han Chang as well as the appeals of his four co-plaintiffs for failure to comply with Rule 3 (c) of the Federal Rules of Appellate Procedure. App. 1a. Counsel for Han Chang and his co-plaintiffs moved for reconsideration. On October 9, 1991, the Seventh Circuit vacated the order of September 3, 1991 reinstating the four appeals of Han Chang's co-plaintiffs but leaving the dismissal of Han Chang for lack of jurisdiction to stand. App. 3a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents an issue of the reasonable application of Rule 3 (c) of the Federal Rules of Appellate Procedure as interpreted by this Court in *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988). The Seventh Circuit has adopted a literal compliance standard for its application. This Court has rejected such a standard. Dr. Chang's case points up this difference, and therefore he must seek review from this Court for the reinstatement of his appeal.

Petitioner maintains that based on the entry in the Civil Docket Entry Sheet, Dr. Han Chang was still the named plaintiff to pursue appeal at the time the Notice of Appeal was filed. It is for that reason that the Notice of Appeal was filed in his name rather than the name of his representative. A year earlier, on July 17, 1990, the District Court entered an order substituting his executrix, Mrs. Chang, as a party plaintiff. As of June 27, 1991, the date the Notice of Appeal was filed, Dr. Han Chang was listed as the named plaintiff with Poling Chang listed as "proposed". App. 6a. In preparing the Notice, counsel relied on the docket sheet.

For the Seventh Circuit to dismiss Dr. Chang's appeal and then to deny his widow leave to amend or to be substituted ignores the history of Rule 3 (c), the principles developed by this Court in *Torres*, and the practice of other Courts of Appeal.

A. THE DECISION OF THE SEVENTH CIRCUIT DISMISSING DR. HAN CHANG'S APPEAL FOR FAILURE TO COMPLY WITH THE SPECIFICITY REQUIREMENT OF RULE 3 (c) CONFLICTS WITH THE REASONING OF THIS COURT.

The lack of specificity at issue in this case is the omission of a reference to Dr. Chang's widow as executrix of his estate. The question is one of first impression. The Notice of Appeal specified "Dr. Han Chang" alone. App. 1a. The Seventh Circuit concluded that such a failure violates the specificity requirement of Rule 3 (c). Their conclusion is at variance with this Court's opinion in *Torres* and the history of Rule 3 (c).

According to the Seventh Circuit, the specification of Dr. Han Chang instead of his widow as his representative in the Notice of Appeal was a jurisdictional defect. Rule 3 (c) requires "punctilious, literal, and exact compliance". The case reference is omitted in the order of dismissal but may be found in its earlier opinion, *Allen Archery, Inc.* v. *Precision Shooting Equip. Inc.*, 857 F.2d 1176, 1177 (7th. Cir. 1988) as cited in *Hartford Cas. Ins. Co.* v. *Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990). The standard of "punctilious, literal, and exact compliance" is the Seventh Circuit's announced policy and has been applied consistently against litigants who have deviated in the slightest respect.

This Court's opinion in *Torres* lays down different standards for reviewing the specificity of a party designation under Rule 3 (c). Rule 3 (c) provides in pertinent part that a notice of appeal "shall specify the party or

parties taking the appeal". The rule was amended to add that an appeal "shall not be dismissed for informality of form or title of the notice of appeal". As this Court noted, the Advisory Committee to Rule 3 warned that courts should "dispense" with literal compliance in cases in which it can not be fairly exacted. *Torres*, at 2408. Further, this Court found that the ruling in *Foman* v. *Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962) stands for the principle "that the requirements of the rules of procedure should be liberally construed" and that "mere technicalities" should not stand in the way of consideration of a case on its merits". *Torres*, at 2408. The inquiry, therefore, on compliance with the specificity requirement of Rule 3 (c) is whether construing the rule liberally "the litigant's action is the functional equivalent of what the rule requires". *Torres*, at 2409.

With *Torres* as guidance, it is clear that Dr. Chang's executrix has complied with Rule 3 (c). Unlike the unsuccessful litigant in *Torres*, the petitioner in this case has specified a name. The name is sufficient to identify whose layoff claim is being appealed. It was Dr. Chang who was laid off, brought suit, and now appeals. The name provided in the notice of appeal is incomplete, not listing his estate and executrix, but there can be no doubt what is lacking is at best "technically at variance with the letter of a procedural rule". *Torres*, at 2409.

The Seventh Circuit's resort to literal adherence to Rule 3 (c) is directly contrary to the reasoning of this Court. To allow the Seventh Circuit to apply Rule 3 (c) harshly in this case and future cases as it promises to do

will curtail the beneficial operation of the federal rules of procedure.

B. THE DECISION OF THE SEVENTH CIRCUIT DISMISSING DR. HAN CHANG FOR FAILURE TO COMPLY PUNCTILIOUSLY WITH THE SPECIFICITY REQUIREMENT OF RULE 3 (c) CONFLICTS WITH THE REASONING OF OTHER COURTS OF APPEAL.

The Seventh Circuit interprets and applies Rule 3 (c) differently than other Circuit Courts of Appeal. Such differential treatment ignores this Court's understanding that the specificity requirement of Rule 3 (c) be liberally construed allowing the filing of the functional equivalent. Instead of determining whether the name designation gives "fair notice of the specific individual or entity seeking to appeal", the Seventh Circuit requires nothing less than absolute strict compliance.[1]

Other Circuits do not apply Rule 3 (c) with the literal-mindedness endorsed by the Seventh Circuit. In *Brown* v. *Palmer*, 915 F.2d 1435 (10th Cir. 1990), a case directly analogous to this case, the Tenth Circuit found jurisdiction even though the notice of appeal at issue failed to specify the capacity of the litigant. The appellant, a United States Army colonel, noticed his appeal in his

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[1]The Seventh Circuit's position has been reiterated in *Allen Archery Inc.*, above; *Barnett* v. *Stern*, 909 F.2d 973 (7th Cir. 1990); *Baucher* v. *Eastern Ind. Prod. Credit Ass'n*, 906 F.2d 332 (7th Cir. 1990); *FTC* v *Army Travel Service*, 875 F.2d 564 (7th Cir. 1989).

own name alone and not in his official capacity. The action had been filed against him solely in his official capacity. The Tenth Circuit found fair notice was given that the United States was the true appellant. See, *King* v. *Otasco*, 861 F.2d 438 (5th Cir. 1988) (failure to designate the capacities in which a party appeals does not render notice of appeal ineffective).

In *Masquerade Novelty* v. *Unique Industries*, 912 F.2d 663 (3rd Cir. 1990), the Third Circuit found a notice of appeal sufficiently specific by reference to other documents filed by appellant and its attorney during the pendency of the appeal. The Third Circuit looked for the functional equivalent of fair notice not only in the wording of the notice of appeal itself, but in the "attorney appearance form and a civil information statement". *Id.*, at 665. Similarly in this case, any ambiguity in using the name of the deceased plaintiff could have been resolved by referring to the Appearance Form and the Certificate of Interest filed by his attorneys in the Seventh Circuit on July 8, 1991. Both refer to "Dr. Han Chang by Poling Chang". Such additional information would not have left either opposing counsel or the court in doubt as to the identity of the party appealing, yet such an inquiry would not do under the literal standard adopted by the Seventh Circuit.

Finally three Circuits have found sufficient specificity where only a reference to all "defendants" was stated in the notice of appeal. Under the Seventh Circuit's literal compliance standard, no such finding could result. These opinions can be found as follows: *Association of American Medical Colleges* v. *Cuomo*, 913 F.2d 55 (2nd Cir.

1990); *National Center For Immigrants' Rights, Inc.* v. *I.N.S.*, 892 F.2d 814 (9th Cir. 1989); *Ford* v. *Nicks*, 866 F.2d 865 (6th Cir. 1989).

Without question, the Seventh Circuit stands alone in its harsh and narrow-minded approach to Rule 3 (c) issues. Other Circuits have followed the guidance of *Torres* and applied Rule 3 (c) as liberally construed. Under the reasoning found in their opinions, Dr. Han Chang's appeal should be reinstated and his appeal should be considered along with the appeals of his co-plaintiffs. It does not speak well of a unified federal system where a litigant's appeal rights are extinguished in one Circuit while in others review would be given the merits of the appeal.

CONCLUSION

For the foregoing reasons, petitioner Poling Chang, the executrix of Dr. Han Chang's estate, respectfully requests that this court grant a Petition For Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 3, 1991

Before

Hon. William J. Bauer, Chief Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Ivan V. Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Han Chang, et. al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 91-2490 v.	)	
Argonne National Laboratory, Defendant-Appellee.	)	No. 86 C 6304 James B. Moran, Judge.

The notice of appeal in this matter does not comply with the requirements of Rule 3 (c) of the Federal Rules jurisdiction over this matter. The caption and body lists "Han Chang," who deceased, as plaintiff, and Poling Chang, his executrix, is the actual party against whom judgment was entered by the district court. Rule 3 (c) requires "punctilious, literal and exact compliance."

IT IS ORDERED that this appeal be dismissed for lack of jurisdiction.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 9, 1991

Before

Hon. William J. Bauer, Chief Judge

Hon.

Hon.

Ivan V. Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Han Chang, et. al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 91-2490	v.	No. 86 C 6304
Argonne National Laboratory, Defendant-Appellee.	)	James B. Moran, Judge.

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR RECONSIDERATION" filed herein on 9/20/91, by counsel for the plaintiffs.

2. "DEFENDANT-APPELLEE'S MOTION TO STRIKE" filed herein on 9/23/91, by counsel for the defendant.

3. "PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANT-APPELLEE'S MOTION TO STRIKE" filed herein on 10/1/91, by counsel for the plaintiffs-appellants.

The court, on its own motion, ORDERS that the order of 9/3/91 is VACATED and this appeal is REINSTATED as to plaintiffs Ivan V. Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain and Josip Vresk. The motion for reconsideration is DENIED as to Dr. Han Chang and is DENIED as moot as to the remaining plaintiffs.

Briefing will proceed as follows:

1. The brief and required short appendix of the appellants will be due by 11/11/91.

-over-

2. The brief of the appellee will be due by 12/11/91.

3. The reply brief of the appellants, if any, will be due by 12/26/91.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. HAN CHANG, DR. MOHAN JAIN and JOSIP VRESK,	)	
Plaintiffs,	)	No. 86 C 6304
vs.	)	Judge Moran
ARGONNE NATIONAL LABORATORY,	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. HAN CHANG, DR. MOHAN JAIN and JOSIP VRESK, Petitioners, hereby appeal to the United States Court of Appeals for the Seventh Circuit from Memorandum Opinions and the final judgment entered in this action on April 24, 1991 and May 31, 1991.

Date: 6/27/91

/s/Mark LeFevour
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